

- "1. Whether or not the administrative law judge exceeded his jurisdiction in denying the relief requested by the claimant at the preliminary hearing in light of evidence that there were two hostile confrontations in the presence of the supervisor between the claimant and the assaulting co-employee separated by more than several minutes, the last of which resulted in injuries to the claimant.
- "2. Whether or not the administrative law judge exceeded his jurisdiction in finding there was no showing that the attack of the fellow employee could not have been foreseen by the employer since the employer was present during the first attack and thus was on notice, however short, that there was the extreme likelihood [sic] of further aggression by the co-employee."

In its brief, respondent states the issues as: (1) whether the assault arose out of the nature of the employment and (2) whether the claimant was an employee of the claimant at the time of the assault.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record provided and for purposes of preliminary hearing, the Appeals Board finds that the order of the Administrative Law Judge should be reversed.

The sole issue on appeal is whether claimant's injuries arose out of his employment. The Administrative Law Judge denied the claim, finding the assault was not foreseeable by the employer. However, foreseeability is irrelevant when the injury results from an argument in which working requirements or conditions were factors leading up to the assault. Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 807, 909 P.2d 657 (1995) and Brannum v. Spring Lakes Country Club, Inc., 203 Kan. 658, 455 P.2d 546 (1969).

In Harris, the Kansas Court of Appeals applied the foreseeability test because, unlike this case, the claimed injuries did not result from an argument in which working requirements or conditions were factors. Rather, Harris belonged to that class of cases where the injuries resulted from personal animosities between the employees. As that is not the factual scenario presented herein, we find the foreseeability doctrine inapplicable.

The compensability of this claim depends upon which version of the facts one accepts. If one accepts the facts asserted by the respondent that the claimant was the aggressor in the second assault, then claimant stepped aside from his work and left his task. On the other hand, claimant testified that he was the victim of an unprovoked attack. It is not clear from the record whether the Administrative Law Judge fully accepted either the claimant's or the respondent's version of what took place. The Preliminary Decision order is silent in this regard. It is apparent from the Court's comments at pages 21 and 22 of the preliminary hearing transcript that the Administrative Law Judge did not accept the testimony of the employer, Chris Taylor, that claimant had been fired and therefore was not an employee at the time of the fight. The testimony of the claimant was the more credible in this regard.

For purposes of preliminary hearing, we find the assault and resulting injury did arise out of the employment. Accordingly, this matter should be remanded to the Administrative Law Judge for a determination as to claimant's entitlement to the medical and temporary total disability compensation benefits requested.

WHEREFORE, the Appeals Board finds that the Preliminary Decision order dated May 30, 1996 should be, and the same is hereby, reversed and remanded to Administrative Law Judge Robert H. Foerschler for consideration of and decision on the remaining issues. The Appeals Board does not retain jurisdiction over these proceedings.

IT IS SO ORDERED.

Dated this ____ day of July 1996.

BOARD MEMBER

c: David R. Hills, Lenexa, KS
Kip A. Kubin, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director